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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-1072

GLENN R. HEYMAN, TRUSTEE IN BANKRUPTCY OF F. W. KOENECKE & SONS, INC.,

Petitioner,

vs.

GEORGE E. MAHIN, SUCCESSOR DIRECTOR OF THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, ET AL.,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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The burden of petitioner's complaint is that the graduated discount provision of the Illinois Cigarette Tax Act discriminated against the bankrupt (predecessor of petitioner) in particular and others who might be in its circumstances. Whether the graduated discounts be called a tax or a system of compensation, the effect was to require of the bankrupt the payment of a higher price for cigarette tax stamps affixed to packages of cigarettes sold by it than the price charged for similar stamps sold to others, the distinction being based solely upon the bankrupt's larger volume of purchases.

Respondents argue (page 8) that petitioner has no cause to complain as to the amount of discount gratuitously allowed, because the legislature has no obligation to allow *any* discount. Petitioner does not quarrel with the latter statement, but insists that when a discount is allowed, it may not be on a discriminatory basis as is the case here. The discontinuation of all discounts would affect all distributors alike. The present graduated system does not; it discriminates against larger volume distributors.

Respondents devote a substantial portion of their Brief in Opposition (and appendix thereto) to quotations from which they argue that Robert Koenecke was a scoundrel. At page 8 of its Brief, respondents then state that the honesty or dishonesty of Koenecke raises no important Federal question of law. We could not be more in agreement with the latter assertion. Aside from the fact that the United States Supreme Court is hardly the forum in which to initially introduce transcripts of evidence in other proceedings, it should be borne in mind that the original decision in favor of respondents in the Circuit Court of Cook County, Illinois, was on a motion to strike* which takes as admitted for the purposes of that motion all factual allegations well pleaded.

Further, assuming for the purposes of argument, that Mr. Koenecke was as evil as is argued by respondents, the fact that he apparently avoided the enforcement of the graduated discount provision, by whatever means, for a period of five or six years does not have any bearing on the question of whether the enactment itself, when enforced in accordance with its terms, is or is not a violation of the constitutional safeguards contained in the Fourteenth Amendment to the United States Constitution insuring the equal protection of the laws.

* (Notwithstanding the implication at page 6 of respondents' Brief In Opposition that this case was tried in the Circuit Court.)

Apparently respondents' argument is that Koenecke is such a bad man that he should not be permitted to recover the taxes paid under protest whether or not the statute is constitutional. However, petitioner is the trustee in bankruptcy of F. W. Koenecke & Sons, Inc. and as such prosecutes this litigation on behalf of the creditors of that bankrupt. It does not do so on behalf of Koenecke.

Respondents seek here to argue many issues of fact on which they were apparently unwilling to permit petitioner to have a hearing in the Circuit Court of Cook County, Illinois. They have persisted in their arguments through the proceedings in the Supreme Court of Illinois which resulted both in the Crebs opinion of November 9, 1970 and ultimately what respondents term the "official" opinion rendered by Mr. Justice Ryan on September 13, 1971. Contrary to what might be implied from respondents' suggestion that "the Illinois Supreme Court thereupon speaking through Mr. Justice Ryan, tactfully and mercifully ignored the opinion of Mr. Justice Crebs and wrote its own opinion," the Crebs opinion did not result from a rump session of the Illinois Supreme Court. At the time Mr. Justice Crebs rendered the Court's opinion, he was a full-fledged member of that Court. What is intended by respondents in referring to the Ryan opinion as the Court's "*own*" opinion is not known. But it is plain that but for the filing by respondents of a petition for rehearing and its subsequent reversal, the Crebs opinion would have been published as the "official" opinion of the Supreme Court of Illinois and was at the time of its rendition the official act of that Court.

The Ryan opinion of the Supreme Court of Illinois has resulted in the denial to petitioner of an opportunity to be heard upon a claim of denial and violation of petitioner's rights under the Fourteenth Amendment to the United States Constitution. To do so the Supreme Court of Illi-

nois rules that the allegation of paragraph 14 of petitioner's Amended Complaint relating to the costs of applying cigarette tax stamps (for which the discount is allowed as compensation pursuant to the terms of the statute) that "said costs do not decrease with increased collections of said tax" is not an allegation of fact but is a mere conclusion. The mere designation of these factual allegations as conclusions does not resolve that issue. Even if the allegations were properly characterized as conclusions (they were not), the raising of that objection by the Supreme Court for the first time in proceedings before that Court with the result that petitioner is denied an opportunity to amend the allegations and be heard on his constitutional claim is itself a denial of the rights guaranteed by the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

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